United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7280

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

HOWARD SHEPPARD,

Plaintiff-Appellee,

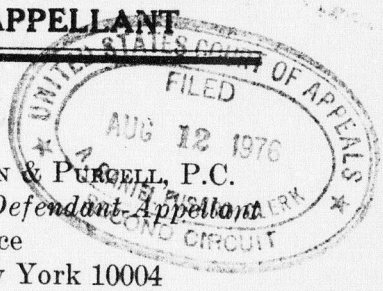
against

PRUDENTIAL GRACE LINES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT



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BRIEF FOR DEFENDANT-APPELLANT

Issues Presented for Review

1. Whether the trial Court erred in failing to use its discretion to set the verdict aside because it was excessive.

2. Whether the proof offered by the plaintiff on damages was sufficient to support the verdict of $120,000 before it was reduced to $84,000 for his own negligence.

3. Whether the Court was correct in overruling defendant's objections and permitting Mr. Schamann, plaintiff's economic expert, to testify to the annual average wages of First Assistant Engineers on various vessels.

Statement of Case

This appeal arises out of a civil jury cause under the Jones Act and the General Maritime Law pending in the United States District Court for the Southern District of New York by Appellee, Howard Sheppard, (hereinafter referred to as Sheppard) to recover monetary damages for personal injuries allegedly sustained during the course of his employment aboard SS LASH TURKIYE, a vessel owned by the Appellant, Prudential-Grace Lines, Inc. d/b/a Prudential Lines, Inc. (hereinafter referred to as Prudential).

The action was filed by Howard Sheppard on September 11, 1973. Named as defendant was Prudential-Grace Lines, Inc., d/b/a Prudential Lines, Inc. An answer was served by the defendant on December 10, 1973. The trial took place on April 12th and 13th, 1976 before the Honorable Robert L. Carter at the United States District for the Southern District of New York. A jury consisting of six persons was selected. At the trial, portions of the examina-

tion before trial of Chief Engineer Josephs were read. The plaintiff testified in his own behalf to establish his allegations of negligence, as well as his damage claims. In addition, Mr. Schamann, an economic expert, Dr. Koven, a medical expert, and Mr. Zornes, a marine expert, testified on behalf of Sheppard.

Portions of the testimony of Chief Engineer Josephs were read on behalf of the defendant, Prudential. At the trial Dr. Balensweig testified on behalf of Prudential as a medical expert.

The jury returned its verdict on April 13th, 1976. The jury found that the vessel was seaworthy, but that its crew was negligent. They found for the plaintiff in the amount of $120,000. The jury also determined that the plaintiff was thirty per cent contributorily negligent and reduced the verdict to $84,000. After the trial, defendant moved to set the verdict aside as excessive, as well as requesting Judgment Not Withstanding the Verdict. The Court reserved decision, requesting that counsel prepare a formal motion within ten days. The motion pursuant to Rules 50 and 59 of Federal Rules of Civil Procedure was served on April 22, 1976 (A8). The District Court denied that motion on May 13, 1976, without opinion (A31). A judgment was filed on May 27, 1976 (A3). A Notice of Appeal for both the judgment and decision was filed on June 9, 1976. The Record on Appeal was transmitted to the United States Court of Appeals for the Second Circuit on June 24, 1976 and a Supplemental Record was filed on July 21, 1976.

Statement of Facts

Howard Sheppard joined SS LASH TURKIYE in February, 1973. He was employed aboard that vessel in the capacity of First Assistant Engineer. He contends that on April 9, 1973, during the course of his duties aboard that vessel, he was caused to slip and fall in the engine room and

suffer a back injury as a result of that fall. He reported to the vessel's Chief Officer on that day and requested a Master's Certificate (A33) and reported to the United States Public Health Service facility located at Hudson and Jay Streets. At that time he was not treated but was declared not fit for duty, because of his diabetes condition (A34). At his request he was sent to the United States Public Health Service facility in Norfolk, Virginia, for treatment. At that facility he was marked unfit for duty because of his back and on May 3rd, approximately three weeks later, he was marked fit for light duty (A192). After that date he was never again marked unfit for duty by any United States Public Health Service facility, nor declared unfit for duty by any private physician (A82, 83). The plaintiff testified that he experienced a sore and stiff back subsequent to May 12, 1973 (A36), and that as a result of this accident his ability to perform his duties as a First Assistant Engineer were diminished (A40). However, his employment record (A200-202), and his testimony, indicate that he continued to perform these duties except for periods of time that he contends he experienced pain upon "heavy lifting." He reported to the United States Public Health Service hospital and complained about his back, on two occasions since May 3, 1973 however, on those two occasions, August 16, 1973 and November 12, 1974 (A197) (A147, 148), he also reported for other reasons. No determination of duty status was made.

Sheppard testified that the only treatment that he ever received for his back consisted of pain killers, but admitted that he was also taking pain killers for other conditions at those times (A73).

Sheppard earned $24,710.67 in 1972; $27,746.59 in 1973; $20,406.19 in 1974; and $29,417.46 in 1975 (A49, 50, 52, 54). Of that last amount, $9,703.90 of his 1975 earnings consisted of vacation pay for the years 1973, 1974 and 1975 (A55). He testified that he was never marked unfit for

duty after May 3, 1973 (A64) and when asked about the time he lost after that date he indicated two short periods of time, one of which was after he left SS PRESIDENT MONROE stating: "well, I think I was off of work about 25 days, but I didn't consider myself unfit for duty that entire length of time" (A65). He also stated that he lost time from work when he left the AZALEA CITY on August 16, 1974 for a period of six days. No other periods of lost time were set forth.

Sheppard, in his capacity of a relieving Engineer, would have to leave a vessel when the vessel's permanent first Assistant Engineer returned to work (A69). During the year 1974 he did not receive vacation pay for any period of time, however, he testified that he did not work from January 31, 1974 to May 10, 1974; July 12, 1974 to July 22, 1974; August 16, 1974 to September 6, 1974 and September 14, 1974 until the end of the year (A75). When asked why he was not employed for that period of time he stated: "well, some of the time I wasn't able to work. I didn't have any doctor's certificate", and also admitted that he was having his teeth fixed which required him to be available for appointments (A73).

Mr. Schamann testified to average earnings earned by First Assistant Engineers on various class vessels, for various years, basing his findings on an average for those class vessels, which included base pay, average overtime payments and vacation pay. Mr. Schamann admitted that he had no knowledge whether or not the plaintiff earned more or less than the averages set forth (A122), on any particular vessel. He also admitted that the plaintiff, as a First Assistant Engineer sailing mostly in the capacity as a Relieving Engineer, would earn a lesser amount than those regularly employed engineers, but that he did not have any statistics for Marine Engineers engaged in that type of employment (A122).

A Chief Engineer earns a greater amount than the First Assistant Engineer and performs administrative duties (A128). Mr. Sheppard had a license and was qualified to sail in the capacity of Chief Engineer (A127). Dr. Koven indicated that the plaintiff was capable of working as a Marine Engineer although he should avoid placing stress on his back (A150). Reducing stress would relieve his condition. He stated that he could work as a Marine Engineer if he avoided heavy lifting (A150). Dr. Balensweig testified for the defendant and indicated that the man was fit for work (A157) and that shortly after his examination on October 7, 1974, all symptomatology would resolve itself (A156, 157).

POINT I

It was error to permit Mr. Schamann to testify to unrelated monetary amounts.

The Court should not have permitted Mr. Schamann, the plaintiff's economic expert to testify over objection. Mr. Schamann's testimony was inflammatory and intended to reveal large monetary amounts to the jury that had no relation to the plaintiff's earnings. He testified to the earnings of a permanent First Assistant Engineer aboard various classes of vessels from 1973 to 1977 (A116-119). These figures were comprised of average monthly earnings including base pay, overtime and vacation pay. He admitted not knowing if Mr. Sheppard earned more than these average amounts while he actually worked for short periods of time aboard these various vessels (A122), and that Sheppard's actual earnings would be the best indication of Sheppard's earnings losses, if any, yet those figures were never disclosed by Sheppard. He also admitted that a person sailing as a Relief Engineer would not make the same annual salary as a man who was attached permanently to a vessel (A122). Inasmuch as Mr. Sheppard sailed for the most part as a Relieving Engineer, his

earnings were not consistent with the earnings figures disclosed by Mr. Schamann.

This was not a situation in which the plaintiff was permanently disabled and unable to be employed. In such a situation evidence of his lost earning capacity solely through contractual rates may be valid. This was a situation where a man worked subsequent to the accident and had only been declared unable to work by the United States Public Health Service for a period of three weeks immediately after the accident. Consequently, his diminished earnings during the period of time that he worked would have to be proven vessel by vessel to show that he earned less than the average engineer on that vessel for a similar period of time. This was not done.

Mr. Schamann's testimony did not actually apply to Sheppard, it was speculative and objected to (A94), and overruled (A117).

Over objection he testified (A116-119) that on a Class B vessel, such as the AZALEA CITY, Sheppard would have earned:

1973—$22,480.00
1974—$30,872.00
1975—$34,088.00
1976—$36,147.00
1977—$37,666.00

On the AMERICAN RANGER, which is a Class A vessel plus 10 per cent;

1973—$22,041.00
1974—$30,420.00
1975—$33,684.00
1976—$35,797.00
1977—$37,380.00

On the NEW YORKER;

1973—$22,295.00
1974—$32,949.00
1975—$35,073.00
1976—$37,206.00
1977—$38,777.00

On the PRESIDENT MONROE similar to the LASH TURKIYE and an automated Class A3 vessel;

1973—$37,806.00
1974—$41,199.00
1975—$45,261.00
1976—$48,247.00
1977—$50,164.00

In light of the excessive verdict, it appears that the jury, receiving figures as high as $50,164.00 became inflamed and misguided. That figure was for the 1977 rates of SS LASH TURKIYE and SS PRESIDENT MONROE, vessels that Sheppard had not worked upon since July 28, 1973 (A202). Consequently, Mr. Schamann's testimony relating to the past earnings of Mr. Sheppard up until the time of trial was speculative and there is no indication that Sheppard actually lost earnings during that period of time as a result of his injuries and other than for a three week period. Permitting those figures to be revealed to the jury was error and its effect was inflammatory.

The figures presented were also irrelevant and speculative with regard to future lost earnings. There was no determination that Mr. Sheppard could not work, only that he could not perform jobs requiring heavy lifting. Sheppard testified that he quit his last vessel, SS AMERICAN RANGER because he would have to do heavy lifting on that vessel in as much as the other members of the crew were not able to perform "heavy lifting" (A80). He expected a transfer within that company. According to Mr. Scha-

mann, Relief Engineers employed by the same company and relieving on their vessels would probably earn about the same as a permanent First Assistant Engineer assigned to one vessel (A121). Consequently, there was no way of concluding that Mr. Sheppard would have lost earnings in the future based on Mr. Schamann's testimony and in this regard it should have been stricken pursuant to the defendant's objection (A117).

Damages cannot be based on speculation. *Yarrow* v. *United States,* 309 F. Supp. 922, 931 (S.D.N.Y. 1970); *Jackson* v. *Coggan,* 330 F. Supp. 1060 (S.D.N.Y. 1971); *James Wood General Trading Establishment* v. *Coe,* 297 F. 2nd 651, 658 (2nd Cir. 1961). *United States Steel Corporation* v. *Lamp,* 436 F2nd 1256, 1269 (6th Cir. 1970). In *James Wood General Trading Establishment* v. *Coe* the Court stated at Page 658:

> "Damages cannot be based on speculation. The difficulty of measuring and appraising the amount once it is clear that actual damage has been sustained is another matter. Whereas here the existence of any damage whatever would have to be a matter of guess work no recovery is allowed. . . . Citations omitted."

In *United States Steel Corporation* the Court quoting *Imperial Oil, Ltd.* v. *Drlik,* 234 F.2d 4, 11 (6th Cir. 1956), stated at page 1269:

> "One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident."

In *Yarrow* v. *United States* at Page 931, the burden of proof of damages is discussed:

> "The New York rule as to burden of proof of damages is set forth in Dunkel v. McDonald, 272 App. Div. 267, 70 N.Y.S. 2d 653 (1st Dept. 1947), aff'd 298 N.Y. 586, 81 N.E.2d 323 (1948), as follows:
>
> > 'A plaintiff seeking compensatory damages has the burden of proof and should present to the court a proper basis for ascertaining the damages he seeks to recover. They must be susceptible of ascertainment in some manner other than by mere conjecture or guess work. (Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 109, 121 N.E. 756, 758; Janvier Inc. v. Baker, 229 App. Div. 679, 680, 243 N.Y.S. 173, 174.) However, where it is certain that damages have been caused by a wrong and the only uncertainty is as to the amount, there can be no good reason for refusing on account of such uncertainty any damages for the wrong. (Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 4 N.E. 264; Bagley v. Smith, 10 N.Y. 489, 499; MacGregor v. Watts, 254 App. Div 904, 5 N.Y.S. 2d 525.) A wrongdoer may not escape liability simply because there are not available the ordinary standards for proving damages. The law will resort to some practical means that will be just to the parties. (Brady v. Erlanger, 188 App. Div. 728, 733, 177 N.Y.S. 301, 304 affd. 231 N.Y. 563, 132 N.E. 889; Alexander's Dept. Stores, Inc. v. Ohrbach's, Inc. 269 App. Div. 321, 328, 56 N.Y.S. 2d 173, 179; Merscheim v. Musical Mutual Protective Union, 8 N.Y.S. 702, 704-705.)' (Id. at 270, 70 N.Y.S. at 656).
>
> "The *extent of proof* as to the amount of injury required in New York has been stated as follows:
>
> > " 'The damages recoverable in tort actions cannot be contingent, uncertain, or speculative (footnote omit-

> ted); but if the fact is established that the plaintiff has sustained an actionable injury as the direct result of the defendant's wrongful act, reasonable certainty as to the amount of that injury is all that is required (footnote omitted). * * *' 13 New York Jurisprudence 444, citing, among other cases, Steitz v. Gifford, 280 N.Y. 15, 19, N.E. 2d 661, 122 A.L.R. 292 (1939); Tilley v. Hudson River R. Co., 24 N.Y. 471 (1862)."

Although damages cannot be awarded on mere speculation, the plaintiff never proved a loss of present earnings even though such proof, at least for the period of three weeks after he left SS LASH TURKIYE, as well as his claim of another two periods of lost time totalling under 30 days, was available. Similarly, loss of future wages, if any, was not proven and it is possible based on his own expert's testimony that Sheppard's earnings could increase. In fact, Sheppard's own testimony indicates that he took time to go to welding school and increase his qualifications.

He contends that he resigned his employment aboard SS AMERICAN RANGER because two of the other men had bad backs and he could not do the work. However, he will be seeking employment aboard one of their other vessels when he returns from vacation, and may with proper relief jobs, earn an amount according to Mr. Schamann, equal to a permanent First Assistant Engineer on one vessel (A126). He may also return to that vessel if the other crew members leave. Furthermore, Mr. Schamann testified that Chief Engineers would receive a higher rate of pay than the plaintiff because it is an administrative position not requiring physical work and that Mr. Sheppard holds a license qualifying him for that position (A128, 129). Accordingly, Sheppard has proven that his future earnings capacity, even if he does experience back pain, could be equal to the earnings of any

other First Assistant Engineer or greater. In fact, obtaining the job of Chief Engineer should, according to Dr. Koven, alleviate his back compl. nts.

Thus, the only proof of lost wages would be for a three week period immediately after the incident. Permitting Mr. Schamann to testify to unrelated annual amounts prejudiced Prudential and is reversible error.

POINT II

The verdict was excessive and outrageous and should be set aside.

This court has the power to review jury verdicts and the decisions of the trial judge with regard to excessiveness of verdict. 28 U.S.C. 2106; *Wicks* v. *Henken,* 378 F2d 395 (2nd Cir. 1967); *Grunenthal* v. *Long Island Railroad Co.,* 393 U.S. 156, 21 L.Ed. 2nd 309, 313, 89 S.Ct. 331 (1968).

The standards used to determine if a verdict was excessive were described in *Dagnello* v. *Long Island Railroad Co.,* 289 F2d 797, 806 (2nd Cir. 1961) and approved by the Supreme Court in *Grunenthal* v. *Long Island Railroad Co.,* supra, at page 313 as follows:

> "We Appellate Judges are not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount was so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but so surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."

In the instant litigation Sheppard has only proven that he lost wages for a period of three weeks. He has never proven the actual amount that he lost. Giving him the bene-

fit of every doubt would permit a determination of lost wages under $10,000. Consequently, the verdict of $120,000 would consist of $110,000 for pain and suffering, past, present and future.

Pain and suffering and future pain and suffering can only be awarded upon reasonable certainty. *Yarrow* v. *United States,* supra. For an individual, who did not undergo surgery and made complaints to the Public Health Service on only four occasions, two of which were within three weeks after the accident, this verdict is excessive as a matter of law and the trial Judge abused his discretion by denying Prudential's motion to set the verdict aside as excessive. That verdict was inordinate, unreasonable, outrageous and indicative of a jury that lost its head and should have been set aside.

Conclusion

The verdict was excessive and the trial Judge abused his discretion in denying Prudential's motion to set it aside or reduce the amount.

That the trial Judge erred in permitting Mr. Schamann to testify and said error allowed the jury to hear inflammatory and irrelevant testimony which resulted in a jury that lost its head and an excessive, outrageous verdict. As such, it should be set aside in its entirety or reduced.

Respectfully submitted,

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~~Due and timely service of~~ Two copies of the within Brief is hereby admitted this 12th day of August 1976

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Attorneys for Appellee